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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TONI M. REYES, ) NO. EDCV 06-1281-CT  
)  
Plaintiff, ) OPINION AND ORDER  
)  
v. )  
)  
MICHAEL J. ASTRUE, )  
Commissioner of )  
Social Security, )  
)  
)  
Defendant. )  
)  
)

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For the reasons set forth below, it is ordered that judgment be entered in favor of defendant Commissioner of Social Security ("the Commissioner") because the Commissioner's decision is supported by substantial evidence and is free from material legal error.

SUMMARY OF PROCEEDINGS

On November 16, 2006, plaintiff, Toni M. Reyes ("plaintiff"), filed a complaint seeking judicial review of the denial of benefits by the Commissioner pursuant to the Social Security Act ("the Act"). The parties filed a consent to proceed before the magistrate judge. On May 22, 2007, plaintiff filed a memorandum of points and authorities in support of plaintiff's complaint. On June 22, 2007, the Commissioner

1 filed a memorandum in support of defendant's answer.

2 SUMMARY OF ADMINISTRATIVE RECORD

3 1. Proceedings

4 On December 28, 2001, plaintiff filed applications for disability  
5 insurance and Supplemental Security Income ("SSI") benefits, alleging  
6 disability since April 30, 2001 due to cervical cancer and depression.  
7 (TR 92-94; 112; 571-73).<sup>1</sup> The applications were denied initially and  
8 upon reconsideration. (TR 35-44; 574-84).

9 Plaintiff filed a request for a hearing before an administrative  
10 law judge ("ALJ") and on June 10, 2003 and administrative hearing was  
11 held. Plaintiff did not appear at the hearing because she was  
12 incarcerated as the result of a perjury conviction. (TR 587).  
13 Plaintiff's attorney and a vocational expert ("VE") appeared and  
14 testified before an ALJ. (TR 585-91). On July 2, 2003, the ALJ issued  
15 a decision that plaintiff was not disabled, as defined by the Act, and  
16 thus was not eligible for benefits. (TR 28-34). On July 31, 2003,  
17 plaintiff filed a request with the Social Security Appeals Council to  
18 review the ALJ's decision. (TR 68).

19 On April 23, 2004, the Appeals Council issued an order remanding  
20 the case to an ALJ with directions to offer plaintiff an opportunity for  
21 a hearing. (TR 76-77).

22 On December 14, 2005, a supplemental administrative hearing was  
23 held. (TR 592-606). Plaintiff attended the hearing with her attorney  
24 and testified. A vocational expert also testified. On April 24, 2006,

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<sup>1</sup> "TR" refers to the transcript of the record of  
27 administrative proceedings in this case and will be followed by  
the relevant page number(s) of the transcript.

1 an ALJ issued a decision that plaintiff was capable of performing a  
2 range of sedentary work, which enabled her to perform jobs that exist in  
3 significant numbers in the national economy. (TR 14-20). Plaintiff  
4 subsequently sought judicial review of that decision in this court.

5 2. Summary Of The Evidence

6 The ALJ's April 24, 2006 decision is attached as an exhibit to this  
7 opinion and order and, except as otherwise noted, materially summarizes  
8 the evidence in the case.

9 PLAINTIFF'S CONTENTIONS

10 Plaintiff contends as follows:

11 1. The ALJ failed to properly consider plaintiff's subjective  
12 complaints and properly assess plaintiff's credibility; and,  
13 2. The ALJ failed to properly consider all the medical evidence of  
14 record, including opinions from treating and consulting physicians.

15 STANDARD OF REVIEW

16 Under 42 U.S.C. §405(g), this court reviews the Commissioner's  
17 decision to determine if: (1) the Commissioner's findings are supported  
18 by substantial evidence; and, (2) the Commissioner used proper legal  
19 standards. Macri v. Chater, 93 F.3d 540, 543 (9th Cir. 1996).  
20 Substantial evidence means "more than a mere scintilla," Richardson v.  
21 Perales, 402 U.S. 389, 401 (1971), but less than a preponderance.  
22 Sandgathe v. Chater, 108 F.3d 978, 980 (9th Cir. 1997).

23 When the evidence can reasonably support either affirming or  
24 reversing the Commissioner's conclusion, however, the Court may not  
25 substitute its judgment for that of the Commissioner. Flaten v.  
26 Secretary of Health and Human Services, 44 F.3d 1453, 1457 (9th Cir.  
27 1995). The court has the authority to affirm, modify, or reverse the

1 Commissioner's decision "with or without remanding the cause for  
2 rehearing." 42 U.S.C. §405(g). Remand is appropriate where additional  
3 proceedings would remedy defects in the Commissioner's decision.  
4 McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989).

5 DISCUSSION

6 1. The Sequential Evaluation

7 A person is "disabled" for the purpose of receiving social security  
8 benefits if he or she is unable to "engage in any substantial gainful  
9 activity by reason of any medically determinable physical or mental  
10 impairment which can be expected to result in death or which has lasted  
11 or can be expected to last for a continuous period of not less than 12  
12 months." 42 U.S.C. §423(d)(1)(A).

13 The Commissioner has established a five-step sequential evaluation  
14 for determining whether a person is disabled. First, it is determined  
15 whether the person is engaged in "substantial gainful activity." If so,  
16 benefits are denied.

17 Second, if the person is not so engaged, it is determined whether  
18 the person has a medically severe impairment or combination of  
19 impairments. If the person does not have a severe impairment or  
20 combination of impairments, benefits are denied.

21 Third, if the person has a severe impairment, it is determined  
22 whether the impairment meets or equals one of a number of "listed  
23 impairments." If the impairment meets or equals a "listed impairment,"  
24 the person is conclusively presumed to be disabled.

25 Fourth, if the impairment does not meet or equal a "listed  
26 impairment," it is determined whether the impairment prevents the person  
27 from performing past relevant work. If the person can perform past

1 relevant work, benefits are denied.

2 Fifth, if the person cannot perform past relevant work, the burden  
 3 shifts to the Commissioner to show that the person is able to perform  
 4 other kinds of work. The person is entitled to benefits only if the  
 5 person is unable to perform other work. 20 C.F.R. §§404.1520, 416.920;  
 6 Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).

7       A. Credibility Assessment

8 Plaintiff, who could not attend her previous hearing because she  
 9 was incarcerated as a result of what plaintiff admitted was a perjury  
 10 conviction, (TR 587, 603),<sup>2</sup> contends that the ALJ failed to properly  
 11 assess her credibility.

12 To reject a plaintiff's subjective complaints, the ALJ "must  
 13 provide cogent reasons for the disbelief." Greger v. Barnhart, 464 F.3d  
 14 968, 972 (9<sup>th</sup> Cir. 2006)(quoting Lester v. Chater, 81 F.3d 821, 834 (9<sup>th</sup>  
 15 Cir. 1995)). In the absence of evidence of malingering, the ALJ's  
 16 reasons for rejecting plaintiff's testimony "must be clear and  
 17 convincing." Id. (quoting Swenson v. Sullivan, 876 F.2d 683, 687 (9<sup>th</sup>  
 18 Cir. 1989)). Moreover, when an ALJ "finds that a [plaintiff's]  
 19 testimony relating to the intensity of his pain and other limitations is  
 20 unreliable, the ALJ must make a credibility determination citing the  
 21 reasons why the testimony is unpersuasive." Morgan v. Comm'r of Soc.  
 22 Sec. Admin., 169 F.3d 595, 599 (9<sup>th</sup> Cir. 1999)(citation omitted). In  
 23 making a credibility determination the ALJ "must specifically identify

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25       2Plaintiff also reported to Dr. Romualdo Rodriguez, the  
 26 psychiatrist who examined her consultatively on July 6, 2004,  
 27 that she had been arrested at least twice, and that her most  
 recent arrest at that time was in 2003 for perjury and theft,  
 which involved identity theft. (TR 285).

1 what testimony is credible and what testimony undermines the  
2 [plaintiff's] complaints. In this regard, questions of credibility and  
3 resolution of conflicts in the testimony are functions solely of the  
4 Secretary." Id. (Citations omitted).

5 In assessing plaintiff's credibility, the ALJ may use "ordinary  
6 techniques of credibility evaluation," such as considering plaintiff's  
7 reputation for truthfulness and any inconsistent statements in  
8 plaintiff's testimony. Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th  
9 Cir. 2001)(citation omitted). Additionally, the ALJ may consider a  
10 number of other factors:

11 1. The nature, location, onset, duration, frequency,  
12 radiation, and intensity of any pain; 2. Precipitating and  
13 aggravating factors (e.g., movement, activity, environmental  
14 conditions); 3. Type, dosage, effectiveness, and adverse  
side-effects of any pain medication; 4. Treatment, other than  
medication, for relief of pain; 5. Functional restrictions;  
and 6. The [plaintiff's] daily activities.

15 Burch v. Barnhart, 400 F.3d 676, 680 (9th Cir. 2005), citing Bunnell v.  
16 Sullivan, 947 F.2d 341, 346 (9th Cir.1991).

17 The ALJ met these requirements here. The ALJ found that although  
18 plaintiff's medically determinable impairments reasonably could be  
19 expected to produce the alleged symptoms, "her statements concerning the  
20 intensity, duration and limiting effects of the symptoms are not  
21 entirely credible." (TR 17). He gave several reasons for this finding.

22 First, the ALJ noted plaintiff's perjury conviction (TR 18), which  
23 is a proper basis for questioning her credibility. See Burch v.  
24 Barnhart, 400 F.3d at 680 (plaintiff's reputation for truthfulness  
25 properly considered in credibility analysis).

26 The ALJ also pointed out the inconsistency between plaintiff's  
27 alleged disabling impairments and her activities of daily living, which

1 include raising four children with no assistance from their fathers.  
 2 (TR 18, 315, 317, 320). See Rollins v. Massanari, 261 F.3d 853, 586-87  
 3 (9th Cir. 2001)(finding that ALJ properly found that plaintiff's claim  
 4 to have totally disabling pain was undermined by her daily activities  
 5 which including attending to the needs of her young children with no  
 6 help from her ex husband).

7 The ALJ also noted that plaintiff was not undergoing treatment from  
 8 a psychologist or psychiatrist despite her claims of disabling  
 9 depression. (TR 17-18). Burch, 400 F.3d at 681 (ALJ properly  
 10 discredited plaintiff's claims of disabling pain and depression based on  
 11 lack of aggressive treatment). In fact, psychiatrist Reynaldo Abejuela,  
 12 who examined plaintiff consultatively on September 30, 2005, reported  
 13 that plaintiff spent a significant portion of the time during the exam  
 14 asking questions about how she could get benefits, said that "she feels  
 15 sad off and on because Social Security is taking a long time to give her  
 16 benefits," that the reason she is depressed is because "Social Security  
 17 is taking a long time to give her some help," and that "my doctor makes  
 18 me depressed because he always tells Social Security I can work." (TR  
 19 315, 320).

20 The ALJ's assessment of plaintiff's credibility and consideration  
 21 of her subjective complaints was free from material legal error and  
 22 supported by substantial evidence.

23       B. Medical Evidence

24 Plaintiff contends that the ALJ improperly based his in  
 25 determination of plaintiff's residual functional capacity ("RFC")  
 26 "almost entirely" on the assessment of Dr. Adi Klein, M.D., who  
 27 conducted an internal medicine consultative examination of plaintiff on

1 October 1, 2005. (TR 325-331). Plaintiff contends that this  
 2 examination does not constitute substantial evidence supporting the  
 3 ALJ's assessment. She also asserts that the ALJ failed to properly  
 4 consider the opinions of Dr. Divy Kikani, who conducted a psychiatric  
 5 consultative examination of plaintiff on February 28, 2002 (TR 202-205),  
 6 and Dr. Elmer Symonett, plaintiff's treating physician. (TR 359-62).

7 The ALJ must base a residual functional capacity ("RFC") assessment  
 8 on all of the relevant medical and other evidence of record, including  
 9 the opinions of treating physicians and physicians who examine the  
 10 plaintiff consultatively for the Commissioner. See 20 C.F.R. §§  
 11 404.1545; 416.945. However, it is the responsibility of the ALJ, not a  
 12 physician, to determine residual functional capacity. See 20 C.F.R. §§  
 13 404.1527(e)(2), 416.927(e)(2); Vertigan v. Halter, 260 F.3d 1044, 1049  
 14 (9th Cir. 2001). In addition, the ALJ is responsible for determining  
 15 credibility, resolving conflicts in the medical testimony and  
 16 ambiguities in the evidence and where the evidence is susceptible to  
 17 more than one rational interpretation, it must be upheld. Andrews v.  
 18 Shalala, 53 F.3d 1035, 1039-40 (9th Cir. 1995)(citation omitted). See  
 19 also Johnson v. Shalala, 60 F.3d 1428, 1434 (9th Cir. 1995)(the  
 20 reviewing court will not reverse an ALJ's conclusions about  
 21 contradictory or ambiguous evidence).

22 In this case, plaintiff was examined consultatively concerning her  
 23 physical complaints on three separate occasions. None of the  
 24 consultative examiners opined that plaintiff had limitations that would  
 25 preclude her from all work. (TR 219-23; 277-81; 325-331). The most  
 26 restrictive assessment of her functional limitations was given by Dr.  
 27 Adi, a board certified internal medicine specialist who examined

1 plaintiff on October 1, 2005. The examination was essentially normal  
2 with the exception of lymphedema in the left leg and limited range of  
3 motion in the back and minor strength reduction in the hand due to pain  
4 reported by plaintiff. Dr. Adi found that plaintiff was limited to  
5 lifting and carrying 10 lbs occasionally and frequently, walking or  
6 standing for two hours and sitting for six hours in an eight hour  
7 workday, with appropriate breaks. (TR 330).

8 In assessing plaintiff's RFC, the ALJ reviewed and considered all  
9 the record evidence, including plaintiff's medical records and the  
10 findings of the consultative examiners. (See TR 17). The ALJ's  
11 restrictive RFC assessment is supported by the findings of Dr. Adi and  
12 is more restrictive than the assessments by the previous consultative  
13 examiners and the state agency physicians. Dr. Adi's assessment is  
14 consistent with his clinical findings and the overall medical evidence  
15 and, therefore, constitutes substantial evidence supporting the ALJ's  
16 decision. See Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir.  
17 2002) ("The opinions of non-treating or non-examining physicians may also  
18 serve as substantial evidence when the opinions are consistent with  
19 independent clinical findings or other evidence in the record.").

20 For example, plaintiff's January 2005 magnetic resonance imaging  
21 studies ("MRI") showed mild degenerative changes of the intervertebral  
22 discs in the lumbar spine, which was noted by Dr. Adi in his examination  
23 and assessment. (TR 356). Discography with CT scans showed severe disc  
24 derangement and a tear, but no abnormalities of the thecal sac or neural  
25 foramina. (TR 383). However, as the ALJ noted in reviewing the  
26 evidence relating to plaintiff's alleged back pain, Dr. Adi's  
27 examination, which occurred only a month before the discography of

1 plaintiff's lumber region, revealed that although plaintiff had a  
 2 diminished range of motion in her back due to complaints of pain, she  
 3 had no signs of radiculopathy, her gait was normal, her squatting and  
 4 rising was within normal limits, she required no assistive aid while  
 5 walking and she was able to change position and get on and off the table  
 6 without difficulty. (TR 16-17, 329-30). Dr. Adi limited plaintiff to  
 7 essentially sedentary work. (TR 330). See 20 C.F.R. §§ 404.1567(a),  
 8 416.967(a). The ALJ gave plaintiff a slightly more restrictive  
 9 assessment, limiting her to sedentary work with only occasional  
 10 climbing, stooping, kneeling, crouching or crawling. (TR 17). The  
 11 record contains no opinions of any treating physicians that plaintiff is  
 12 disabled by her back condition.

13 Similarly, while the record shows that plaintiff has lymphedema of  
 14 the left lower extremity, which the ALJ found was a severe impairment,  
 15 the ALJ noted that this condition had not caused muscular or acute skin  
 16 changes and has not always been noted in her medical records. (See,  
 17 e.g., TR 18, 357 (noting edema of left leg, but plaintiff denied any  
 18 sharp shooting pain in leg); 414 (no pedal edema); 454 (noting chronic  
 19 mild edema with no acute changes of skin, edema, musculature or nerve  
 20 pathways); 488 (no edema in extremities)). Plaintiff's lymphedema was  
 21 specifically noted by Dr. Adi and considered in his restrictive  
 22 assessment of her physical limitations. (TR 330).

23 Plaintiff does have a history of cervical cancer, which resulted in  
 24 a hysterectomy in 2001. (TR 179-84). However, as the ALJ observed,  
 25 there is no evidence that the cancer has recurred. (See TR 507(noting  
 26 no signs of metastases in 2004)). In addition, the ALJ noted that  
 27 plaintiff had left kidney atrophy and placement of urethral stents, but

1 that the 2005 lab results showed overall normal kidney function. (See  
 2 TR 17, 413-14).

3 Despite the evidence supporting the ALJ's assessment, plaintiff  
 4 nonetheless contends that the ALJ erred by failing to properly consider  
 5 the opinions of plaintiff's treating physician, Dr. Symonett, that  
 6 plaintiff is disabled. Dr. Symonett filled out three checklist  
 7 disability forms in July of 2003, June of 2004, and August of 2005. In  
 8 2003, Dr. Symonett indicated that plaintiff was status post cervical  
 9 cancer and indicated that she would be unable to work from August 25,  
 10 2003 to January 15, 2004 due to radiation therapy and a swollen leg.  
 11 (TR 360). In June of 2004 he stated that plaintiff was post cervical  
 12 cancer and had lymphedema and appropriate treatment was "Prozac,  
 13 stockings." (TR 362). Finally, in August 2005, he stated that  
 14 plaintiff could not work, had depression and lymphedema and that there  
 15 was no treatment. (TR 359).

16 A treating physician's opinion is generally entitled to greater  
 17 weight than that of an examining physician. Andrews v. Shalala, 53 F.3d  
 18 1035, 1041 (9th Cir. 1995) (citation omitted). However, a physician's  
 19 opinion is not necessarily conclusive as to either a physical condition  
 20 or the ultimate issue of disability. Andrews v. Shalala, 53 F.3d at  
 21 1041 (citation omitted). The weight given a medical opinion depends on  
 22 whether it is supported by sufficient medical data and is consistent  
 23 with other evidence in the record. 20 C.F.R. §§ 404.1527; 416.927.

24 The ALJ may disregard the treating or examining physician's opinion  
 25 whether or not that opinion is contradicted. Andrews v. Shalala, 53  
 26 F.3d at 1041 (citation omitted); Lester v. Chater, 81 F.3d 821, 830-31  
 27 (9th Cir. 1996). However, even if the opinions of such physicians are

1 contradicted by other doctors, the Commissioner may not reject those  
 2 opinions without providing "specific and legitimate reasons" for doing  
 3 so that are supported by substantial evidence. Rollins v. Massanari,  
 4 261 F.3d at 856 (citation omitted); Lester v. Chater, 81 F.3d at 830-  
 5 31.

6 Here, the ALJ accorded the opinions of Dr. Adi greater weight than  
 7 the one page checklist forms filled out by Dr. Symonett for a number of  
 8 reasons. Specifically, the ALJ found that Dr. Symonett's opinion that  
 9 plaintiff's lymphedema was disabling was not supported by the treatment  
 10 records, which showed, as discussed above, that the lymphedema was  
 11 reported only intermittently. (See TR 18, 357, 414, 454, 488). "[A]n  
 12 ALJ may discredit treating physicians' opinions that are conclusory,  
 13 brief, and unsupported by the record as a whole," or "by objective  
 14 medical findings." Batson v. Commissioner of the Social Security  
 15 Administration, 359 F.3d 1190, 1195 (9<sup>th</sup> Cir. 2004).

16 In addition, the ALJ found that Dr. Symonett gave "undue weight" to  
 17 plaintiff's claims of depression and that more weight should be given to  
 18 the findings of the board certified psychiatrist, Dr. Reynaldo Abejuela,  
 19 who found, after giving plaintiff a full mental status examination in  
 20 2005, that plaintiff had, at most, only a mild problem. (TR 321-23).  
 21 See also TR 289 (2004 consultative psychiatric examination by  
 22 psychiatrist Romualdo Rodriguez, M.D., finding that plaintiff has no  
 23 functional mental limitations). The ALJ may properly consider a  
 24 physician's specialization in determining the weight to give that  
 25 physician's opinion. See 20 C.F.R. §§ 404.1527(d)(5); 416.927(d)(5) ("We  
 26 generally give more weight to the opinion of a specialist about medical  
 27 issues related to his or her area of specialty than to the opinion of a

1 source who is not a specialist.") In addition, where, as here, the ALJ  
 2 properly found plaintiff not fully credible, the ALJ may discount a  
 3 physician's opinion based on plaintiff's subjective reporting. See  
 4 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001)(holding that  
 5 ALJ was free to disregard examining physician's opinion premised on  
 6 plaintiff's subjective complaints and testing within plaintiff's control  
 7 where the ALJ had properly discounted plaintiff's credibility). There  
 8 is no indication in the record that Dr. Symonett's finding that  
 9 plaintiff's depression is disabling is based on anything other than  
 10 plaintiff's subjective reports.

11 Plaintiff also contends that the ALJ failed to address the findings  
 12 of Dr. Kikani, the psychiatrist who examined plaintiff consultatively in  
 13 2002. Contrary to plaintiff's contention, however, the ALJ specifically  
 14 considered the findings of Dr. Kikani and discussed them in his prior  
 15 decision, which he expressly incorporated by reference into his current  
 16 2006 decision. (TR 14, 30). Dr. Kikani found that plaintiff was mildly  
 17 to moderately limited due to her psychological condition, but that she  
 18 was able to perform simple, repetitive tasks and that her concentration,  
 19 persistence and pace were not impaired. (TR 30, 204). In the ALJ's  
 20 July 2003 decision, he found, based on the State Agency psychiatrists'  
 21 findings, which were consistent with Dr. Kikani's findings (TR 211-214),  
 22 that plaintiff could perform simple repetitive tasks and interact  
 23 appropriately with co-workers and supervisors, if not the public. (TR  
 24 33).

25 Since that decision, plaintiff was consultatively examined twice by  
 26 psychiatrists and neither found that her psychological condition caused  
 27 any more than a to mild impairment in work-related functioning. (TR  
 28

1 283-89 (finding no mental functional limitations); 314-23 (finding  
 2 psychiatric limitations ranging from none to mild). As the ALJ noted,  
 3 in plaintiff's most recent examination by Dr. Abejuela, she reported  
 4 that she had not been hospitalized for psychiatric conditions and was  
 5 not receiving any psychological treatment and was not taking the  
 6 psychiatric medication apparently prescribed by her doctor. (TR 17,  
 7 315, 320). Accordingly, given this new information, which showed a lack  
 8 of longitudinal treatment and plaintiff's apparent failure to take her  
 9 medication, the ALJ concluded that the finding of a medically  
 10 determinable mental impairment was questionable. (TR 17). Nonetheless,  
 11 the ALJ limited her to performing "basic mental work related [functions]  
 12 on a full time basis as well as more complex work-related activities on  
 13 at least an occasional basis." (Id.) The ALJ was not required to  
 14 adopt Dr. Kikani's or any other doctor's functional assessment, see  
 15 Vertigan v. Halter, 260 F.3d at 1049, and the ALJ properly weighed Dr.  
 16 Kikani's prior assessment and the current assessment, and the fact that  
 17 plaintiff had not sought treatment or taken the medications prescribed  
 18 by her doctor, in determining that plaintiff could perform basic, and  
 19 occasionally more complex, work. See Morgan v. Commissioner of Soc.  
 20 Sec. Admin., 169 F.3d 595, 600-01 (9th Cir. 1999)(ALJ can meet his  
 21 burden of properly considering, weighing and crediting or discrediting  
 22 treating and examining doctors' opinions by "setting out a detailed and  
 23 thorough summary of the facts and conflicting medical evidence, stating  
 24 his interpretations thereof, and making findings.")

25 The ALJ's consideration of the medical evidence was free from  
 26 material legal error and supported by substantial evidence.

27 CONCLUSION

1 Plaintiff clearly has severe impairments. However, a plaintiff who  
2 can still perform work in the national economy, even with a severe  
3 impairment, is not disabled as that term is defined by the Act. See  
4 generally Baxter v. Sullivan, 923 F.2d 1391, 1395 (9th Cir. 1991).  
5 Furthermore, if the evidence can reasonably support either affirming or  
6 reversing the Commissioner's conclusion, the court may not substitute  
7 its judgment for that of the Commissioner. Flaten v. Secretary of  
8 Health and Human Services, 44 F.3d at 1457.

9 After careful consideration of the record as a whole, the  
10 magistrate judge concludes that the Commissioner's decision is supported  
11 by substantial evidence and is free from material legal error.  
12 Accordingly, it is ordered that judgment be entered in favor of the  
13 Commissioner.

14  
15 DATED: September 27, 2007

CAROLYN TURCHIN  
CAROLYN TURCHIN  
UNITED STATES MAGISTRATE JUDGE

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